

Supreme Court, U.S.

FILED

NOV 5 1985

JOSEPH F. SPANIOL, JR.  
CLERK

---

NO. 85-495

---

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

ANSONIA BOARD OF EDUCATION, ET AL.,  
Petitioners,

v.

RONALD PHILBROOK,  
Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

---

David N. Rosen  
400 Orange Street  
New Haven, Connecticut 06511  
(203) 787-3513

---

**BEST AVAILABLE COPY**

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Respondent established a prima facie case of religious discrimination under Title VII by showing that when he was absent because of required religious observance: 1) he was charged for unauthorized leave and docked his salary; and 2) he was prohibited from using any of his annual personal business leave days because defendants' policy explicitly provided that personal business leave days may not be used for "any religious activity"?

2. Did the Court of Appeals err in directing the District Court on remand to consider the reasonableness of the employee's, as well as the employer's, proposals for accommodation?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF CASES .....	iii
STATEMENT OF THE CASE .....	1
REASONS FOR DENYING THE WRIT .....	3
1. The Decision of the Court of Appeals That Respondent Established a Prima Facie Case of Religious Discrimination Is Clearly Correct .....	3
2. There is No Conflict Between the Holding Below and the Decision of the Tenth Circuit in Pinsker v. Joint District No. 28J .....	4
3. The Court of Appeals Properly Directed the District Court to Consider the Accommodations Suggested by the Employee and the EEOC As well As by the Employer .....	5
4. Because Proceedings Are Not Finally Terminated Below, This Case Is Not Appropriate For Review .....	6
CONCLUSION .....	7

## TABLE OF CASES

Case	Page
Estate of Thornton v. Caldor, Inc., — U.S. —, 105 S.Ct. 2914 (1985) .....	5
Pinsker v. Joint District No. 28J, 735 F.2d 388 (10th Cir. 1984) .....	4
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) .....	5, 6
Wisconsin v. Yoder, 406 U.S. 205 (1972) .....	4

## STATEMENT OF THE CASE

Respondent Ronald Philbrook is a typing and business teacher at Ansonia, Connecticut High School. His religion, the Worldwide Church of God, requires him to abstain from work on certain designated religious holy days, an obligation which causes him to miss approximately six days of work per year. His employer, the Ansonia Board of Education, authorizes three days each year for absence for religious observance, and three days leave each year for "personal business." Teachers are prohibited from using their personal business leave for "any religious activity." The school board has treated Philbrook's absences for religious leave in excess of three per year as "unauthorized," and has docked Philbrook's salary for them, which is the prescribed penalty for unauthorized absence.

After the school board refused to make any accommodation to Philbrook's religious needs which would not result in his absences being considered unauthorized leave, Philbrook complained to both the EEOC and the Connecticut Commission on Human Rights and Opportunities. Both agencies investigated, found probable cause to believe a violation was being committed, and attempted to conciliate. Among the proposals made by the agencies, all of which were accepted by Philbrook and rejected by his employer, were: permitting Philbrook to use his business leave for his religious observance; or permitting him to pay the cost of a substitute (which is considerably less than the amount of pay he is docked for attending religious services) and to perform extra work to make up any time lost.

Philbrook then sued in United States District Court, claiming violation of Title VII and of the Free Exercise Clause. The District Court found that Philbrook had not made out a prima facie case. It made no findings on the issue of his sincerity but found that since he was free to practice his religion, so long as he was willing to accept the penalty imposed by his employer for so doing, there was no showing of discrimination. The Court of Appeals reversed, finding that the District Court had failed to follow the proper proof sequence under Title VII or make the required findings. The Court of Appeals did not reach Philbrook's constitutional claim. By way of guidance on remand, it outlined the standards for establishing a prima facie case of religious discrimination under Title VII, holding that:

A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

9a. Believing that Philbrook had "almost certainly" made out a prima facie case, the Court of Appeals also gave the district judge guidelines for evaluating the reasonable accommodation issue under Title VII; but with respect to all issues it remitted to the trial court in the first instance the task of making appropriate factual inquiry and findings.

## REASONS FOR DENYING THE WRIT

### 1. The Decision of the Court of Appeals That Respondent Established a Prima Facie Case of Religious Discrimination Is Clearly Correct.

Petitioners contend that the standard for establishing a prima facie case of religious discrimination under Title VII is that,

a plaintiff must prove (1) he or she has a bona fide religious belief that conflicts with and employment requirement; (2) he or she has informed the employer of this belief; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement.

Petition for Certiorari 5. But this is precisely the standard applied by the Court of Appeals below. While petitioners claim the court below misapplied this standard, the basis of their allegation is hard to discern.

In this Court petitioners dispute only that Philbrook met the third requirement for establishing a prima facie case, contending that since Philbrook was not fired he was not "disciplined" within the meaning of the Title VII standard. Petition for Certiorari 5-7. But Philbrook was denied his request for authorized leave; his absences were officially "unauthorized;" and the prescribed penalty, docking his pay, was imposed. This discipline is plainly cognizable under Title VII. As the

court below noted, the suggestion that discharge is required to make out a prima facie showing of discrimination flies in the face of Title VII's prohibition of discrimination not only in hiring and firing but also "with respect to compensation, terms, conditions or privileges."

11a. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (five dollar penalty was a sufficient burden on religion to trigger the protections of the Free Exercise Clause.)

## 2. There is No Conflict Between the Holding Below and the Decision of the Tenth Circuit in *Pinsker v. Joint District No. 28J*

Petitioners' attempt to show a conflict between the circuits founders because the allegedly conflicting case is plainly distinguishable. In *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984), the Tenth Circuit held that when a school board did permit a teacher to use his personal business leave days for religious observance, it was not obligated to provide the teacher with additional paid leave. So far is this case from being identical with *Pinsker* that the plaintiff's complaint in this case is that he was not given the benefit the plaintiff received in *Pinsker*. Philbrook's complaint in this case is principally that, unlike *Pinsker*, he was not permitted to use his personal leave days for religious observance. Under these circumstances it is hardly surprising that the Tenth Circuit found that the plaintiff teacher there had no complaint, while here the court below held that Respondent had made out at least a prima facie case.

## 3. The Court of Appeals Properly Directed the District Court to Consider the Accommodations Suggested by the Employee and the EEOC As Well As By the Employer.

Because the trial court had improperly found that Respondent failed to make out a prima facie case, the Court of Appeals remanded the case for consideration and findings, particularly relating to reasonable accommodation. In so doing, it noted that "in many circumstances, more than one accommodation could be called 'reasonable,'" 14a, and it was willing to "presume" that Petitioners' leave policy was reasonable, *id.*, although perhaps not as reasonable as the accommodations which had been proposed by Philbrook, the EEOC, or the Connecticut Commission on Human Rights and Opportunities. The court below observed, however, that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), made undue hardship a keystone of the analysis of reasonable accommodation and noted that, in considering the reasonable accommodation issue on remand, the trial court should not simply accept the school board's proposal but should consider the impact, and potential hardship, of the accommodations suggested by Philbrook and the government agencies.

Petitioners attempt to distort this reasonable suggestion into an issue meriting review by insisting, contrary to fact, that the court below was postulating some form of absolute right of accommodation, of the kind this Court found unconstitutional in *Estate of Thornton v. Caldor, Inc.*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2914 (1985). Of course the court was doing no such thing:

it was simply noting the duty of an employer to avoid penalizing an employee's religious practices if, but only if, it can do so without undue hardship. In doing so it was faithfully following this Court's guidance in Hardison.

**4. Because Proceedings Are Not Finally Terminated Below, This Case Is Not Appropriate For Review.**

The Court of Appeals reversed the District Court for failing to apply the burden of proof sequence Petitioners agree is appropriate, or to make the findings required under it. 8a-9a. The remainder of the opinion of the Court of Appeals, including all the observations to which Petitioners take exception, were, in the court's words, "guidelines for the case on remand." 9a. Review of the case at this point would therefore be an abstract exercise at best.

As the court below explained, because the District Court improperly failed to reach the issue of reasonable accommodation or to apply the proper standards in determining Philbrook's religious sincerity, remand was necessary so that the District Court could make appropriate factual inquiry and findings. For the Court to intervene at this point, before factual findings have been made about sincerity or reasonable accommodation, would be to require a decision based on speculation about the facts at best and simply an advisory opinion at worst. Petitioners ask the Court to review the Second Circuit's views of reasonable accommodation

without the benefit of any factual findings or inquiry whatever by the trial court on the reasonable accommodation issue.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David N. Rosen  
400 Orange Street  
New Haven, Connecticut 06511  
(203) 787-3513

Attorney for Respondent

October 29, 1985